

2007

State of Utah v. Robert Brian Pedockie : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 ROBERT BRIAN PEDOCKIE,) App. Ct. No. 20070375-CA
)
 Defendant/Appellant.)

THIS APPEAL IS FROM A FINDING OF GUILTY AND SUBSEQUENT SENTENCING TO PAGGRAVATED KIDNAPPING, A FIRST DEGREE FELONY, AND DEFENDANT WAS SENTENCED A TERM OF TEN YEARS TO LIFE AT THE UTAH STATE PRISON, IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE ERNIE W. JONES PRESIDING.

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MAR 05 2008

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BRIEF OF APPELLANT

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DEFENDANT IS CURRENTLY INCARCERATED AT THE UTAH STATE PRISON.

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Plaintiff/Appellee,)	
vs.)	
ROBERT BRIAN PEDOCKIE,)	App. Ct. No. 20070375-CA
Defendant/Appellant.)	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a finding of guilty of Aggravated Kidnapping, a first degree felony. The Defendant was found guilty by a jury on February 20, 2007. He was sentenced to an indeterminate sentence of ten years to life at the Utah State Prison. This Court has jurisdiction to hear this appeal under the pour over provision in U.C.A. §78-2a-3(j).

ISSUE ON APPEAL AND STANDARD OF REVIEW

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S PRIOR BAD ACTS?**

STANDARD OF REVIEW: This issue should be reviewed under an abuse of discretion standard of review. “When reviewing a trial court’s decision to admit evidence under Rule 404(b), we apply an abuse of discretion standard.” *State v. Widdison*, 28 P.3d 1278 (Utah 2001). In addition, this court should “review the record to determine whether the admission of [prior] bad acts evidence was ‘scrupulously examined’ by the trial judge ‘in the proper exercise of that discretion.’” *State v. Nelson-Wagonner*, 6 P.3d 1120 (Utah 2000)(citations omitted). This issue was preserved for appeal when Defendant filed a motion to exclude the evidence. (R. 646-52).

II. DID THE TRIAL COURT ERR WHEN IT DIDN’T RECOMMEND THAT DEFENDANT BE GIVEN CREDIT FOR TIME HE HAD SERVED?

STANDARD OF REVIEW: This issue presents a question of law which this Court should review for correctness. “Because sentencing errors involve questions of law, we review for correctness.” *State v. Samora*, 2002 UT App 384, ¶ 7. This issue was not preserved for appeal. However, the sentence on remand violated Rule 22(e) of the Utah Rules of Criminal Procedure and therefore this issue can be raised for the first time on appeal. *Id.* ¶ 13.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANNOTATED

§76-5-302. Aggravated kidnapping.

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) acts with intent:

(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;

(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;

(iii) to hinder or delay the discovery of or reporting of a felony;

(iv) to inflict bodily injury on or to terrorize the victim or another;

(v) to interfere with the performance of any governmental or political function; or

(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.

(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:

(a) Section 76-5-301, kidnapping; or

(b) Section 76-5-304, unlawful detention.

(3) Aggravated kidnapping is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (3)(b), (3)(c), or (4), not less than 15 years and which may be for life;

(b) except as provided in Subsection (3)(c) or (4), life without parole, if the trier of fact finds that during the course of the commission of the aggravated kidnapping the defendant caused serious bodily injury to another; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated kidnapping, the defendant was previously convicted of a grievous sexual offense.

(4) If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

- (a) for purposes of Subsection (3)(b), 15 years and which may be for life; or
- (b) for purposes of Subsection (3)(a) or (b):
 - (i) ten years and which may be for life; or
 - (ii) six years and which may be for life.

(5) The provisions of Subsection (4) do not apply when a person is sentenced under Subsection (3)(c).

(6) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

§76-3-405. Limitation on sentence where conviction or prior sentence set aside.

(1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

(2) This section does not apply when:

(a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; or

(b) a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence had never occurred.

§78-2a-3. Court of Appeals jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(j) cases transferred to the Court of Appeals from the Supreme Court.

UTAH RULES OF EVIDENCE

Rule 403- Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b) *other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

RULES OF CRIMINAL PROCEDURE

Rule 22. Sentence, judgment and commitment.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

STATEMENT OF THE CASE

The Defendant was charged with Aggravated Kidnapping in violation of U.C.A. 76-5-302, a first degree felony for an incident that occurred on or about January 2, 2001. (R. 001). The Defendant represented himself at a jury trial and was convicted on October 4, 2002, of the offense of Aggravated Kidnapping, a first degree felony. The Defendant was sentenced to a term of ten years to life at the Utah State Prison. The sentence was ordered to run consecutive to another prison sentence. The trial court also recommended that he receive credit for the time he had served up to that point. (R. 449-50, 901/8-10)

The Defendant filed an appeal of his conviction. His conviction was overturned by this Court in *State v. Pedockie* 2004 UT App 224. The case was remanded back to the trial court on June 28, 2006. There were several pre-trial motions filed after the matter was remanded back to the trial court. Of significance to this appeal is a motion in limine asking the court for an order prohibiting the State from introducing that Defendant had been in prison, was on parole, was a member of the gang Soldiers of Aryan Culture, and that he had a prior history for domestic violence. (R. 646-652). A hearing was held on Defendant's motion and the trial court denied the motion in limine.

A jury trial was held between February 12th and February 20th, 2007. The Defendant was convicted a second time of the offense of Aggravated Kidnapping, a first degree felony. The Defendant was sentenced on April 4, 2007. He was sentenced to an indeterminate term of ten years to life at the Utah State Prison. The sentence was to run consecutive to a previous sentence. The trial court did not give him credit for time served this time. (R. 875-76, 902/20).

The Sentence, Judgment and Commitment was signed on April 6, 2007. The Defendant filed a pro se notice of appeal on April 18, 2007. (R. 881). Counsel also filed a notice of appeal that was date stamped on May 3, 2007. (R. 883)

STATEMENT OF THE FACTS

On January 2, 2001, Jeanette Nicole Sather ("Nicole") was an acquaintance of the Defendant. (R. 466/258). They had been introduced by a friend of hers who had been in prison. (R. 466/258-59). In December of 1999, Nicole sent the Defendant, who was an inmate at the prison, a birthday card. (R. 466/259). The two of them began writing to each other. In the summer of 2000, the Defendant began receiving home visits. Nicole would go visit him on the weekends while the Defendant was at home. (R. 466/261).

Nicole believed the Defendant was the man of her dreams. (R. 466/262). In September of 2000 the Defendant was released from the prison. (R. 466/263). The two of them became involved in a serious relationship. (R. 466/263). By November of 2000, the relationship had soured and Nicole was trying to figure out a way to get out of the relationship. (R. 466/264). Nicole testified that the Defendant was too controlling and domineering for her. (R. 466/265).

The Defendant began dating someone else; but he would still call and leave messages on Nicole's voice mail, and she would return the calls. (R. 466/265). Around Christmas of 2000, the Defendant called Nicole and told her that people were coming to kill her. (R. 466/267). On January 2, 2001, Nicole

ended her shift as the general manager at Nickelcade at around midnight. (R. 466/269). She got in her car and drove home. (R. 466/273).

Shortly after she arrived home she heard a knock at her door. (R. 466/276). She looked out the window and noticed the Defendant's truck parked in the street. (R. 466/277). She went to the door and while the door was locked, she had a conversation with the Defendant through the locked door. (R. 467/5-6). Nicole told him to leave because their relationship was over. He told her that he just needed to get his rings. (R. 467/6). She eventually opened the door and let the Defendant inside her home. She asked if anyone was with him, and the Defendant said they were alone. (R. 467/6).

After the Defendant was inside there was another knock on the door. Nicole told the Defendant not to answer the door, but he did anyway. The Defendant's cousin, Justin Pedockie, was at the door. (R. 467/7). Justin walked into the kitchen and disconnected Nicole's phones and caller I.D. Nicole went into her bedroom and retrieved the Defendant's rings. (R. 467/11). She told the Defendant another ring was in her car. She went outside to her car to get the last ring. (R. 467/14).

She climbed inside her car and retrieved the ring as well as a pocketknife that she kept in her car. (R. 467/14-15). She gave the Defendant his ring and

told him to go. He told her that she was going to go on a ride with them. She told him that if he wanted to go for a ride, they'd go in her car. (R. 467/16).

Defendant told her they were going in his truck and then motioned to Justin. Justin exited the truck and he was carrying a "big black gun" with a banana clip. (R. 467/16). The Defendant told her she was going to go for a ride with them or they'd shoot her right there. (R. 467/18). Nicole got in the truck with Justin and the Defendant. She was seated in the middle of the two men. (R. 467/18-19). Justin put the gun on his right side between his body and the door. (R. 467/19).

The Defendant drove to I-15 and got on the freeway heading southbound. They drove to Payson. (R. 467/20). During the drive, Nicole asked where they were going. The Defendant told her she was going to her grave. (R. 467/22). Along the way, the stopped at a Chevron in Lehi to get gas. (R. 467/24-26). They eventually returned to the freeway and drove to Payson. (R. 467/34). They drove to a farm where the Defendant had previously taken Nicole to ride horses. (R. 467/34). The farm was owned by the Defendant's girlfriend's parents. Her name was Karen; and at the time of the trial, she and the Defendant had apparently married. (R. 467/37).

They parked the truck and Nicole remained sitting inside it. Justin was outside at the front of the truck with the gun. The Defendant was standing

outside near the driver's door. Nicole scooted over to the door. She testified that she kicked the Defendant and then pulled the door shut. She started the truck and put it in gear and began to pull forward. The Defendant opened the door from the outside as Nicole was trying to hold it closed. (R. 467/39-40).

Nicole testified that as soon as she pushed on the gas she heard a gunshot and the truck instantaneously stopped. (R. 467/42). She believed that Justin had fired the gun. Defendant opened the truck door and climbed inside. (R. 467/42). The Defendant put the truck in park and then ran around outside the truck. (R. 467/42). Nicole reached inside the glove box and grabbed a cell phone. Before she could call anyone the Defendant came back into the truck, jumped on top of her and started choking her. (R. 467/43).

Justin opened the door and said "somebody had to have heard that, let's get out of here." (R. 467/44). The Defendant let go of Nicole and they drove away. The Defendant drove to Karen's trailer and went inside the trailer for a short time. (R. 467/45). When he came out of the trailer Karen was with him. (R. 467/53). The Defendant told Justin that they had an alibi, and that Karen was going to say that they had been with her that night. (R. 467/55).

After they left Karen's, the Defendant got back on I-15 and started driving northbound towards Salt Lake. (R. 467/57). The Defendant drove to

West Valley where he dropped Justin off at his house. (R. 467/59-61). Justin took his gun and went inside. (R. 467/61).

After they dropped Justin off, Nicole asked if she could drive because she was concerned with the Defendant's alcohol consumption. The Defendant agreed to let her drive. (R. 467/64). She drove back to her house in Ogden and parked in her driveway. (R. 467/72). The Defendant grabbed a bag out of the back of the truck and then followed Nicole into her house. (R. 467/73). The Defendant put Nicole's phones on top of the bag when he took it into her house. (R. 467/76).

Nicole sat on the couch and the Defendant lay on top of her. (R. 467/77). The Defendant passed out, and Nicole fell asleep. (R. 467/78). The next thing Nicole remembered was her alarm going off. The Defendant had rolled off of her so she got up and turned her alarm off. (R. 467/78). The Defendant remained asleep on the couch for another fifteen or twenty minutes. (R. 467/79).

Nicole noticed the phone so she plugged it in and called a couple of her assistant managers to see if she could find someone to cover her shift at work. (R. 467/79). She also called some of her friends. One of her friends asked if she should call the police. Nicole told her no that she would wind up dead if the police were called. (R. 467/81). Nicole was asked by the prosecutor why

she didn't want the police called. She testified that at the time she was hanging out with the wrong crowd. People who were in and out of prison "and I knew what they did to people who called the police, so I was scared. I didn't want him to get caught. I wanted him just to go away." (R. 467/81-82).

After she hung up the phone, the Defendant walked into the kitchen and asked her if she called the police on him. (R. 467/82). The prosecutor asked Nicole if she was afraid of retaliation if she called the police. Nicole answered, "Yeah. He was in a gang in prison, and I hung out with prior to this with quite a few of the other people that were in the prison and I knew, you know, what they were all capable of doing and what they did to what they call snitches at the time." (R. 467/82).

After the phone call, the Defendant had Nicole go into her room. He pulled his penis out and told her to suck it. (R. 467/83). At the same time the phone rang so she went to answer the phone. The Defendant followed her. It was her friend on the phone. Nicole told her she couldn't talk. (R. 467/83).

After Nicole hung up the phone, the Defendant made Nicole take her clothes off. He then made her turn around and explain what every bruise on her body was from. She told him that she got them from work. (R. 467/84). The phone rang again. Nicole answered it and it was her friend's mother,

Sherrie Norris. (R. 467/85-6). The Defendant plugged in another phone and listened in on the conversation. (R. 467/86).

After the conversation with Sherrie Norris ended the Defendant took Nicole into her room and told her to get dressed. Nicole asked him to please go. He wouldn't leave without her. (R. 467/88). After Nicole was dressed they went outside to his truck. Nicole noticed Sherrie Norris driving by. Nicole motioned with her hand for her to keep driving. (R. 467/89).

Nicole started walking down the sidewalk away from her house. The Defendant began yelling at her to come back. When she didn't go back he told her he was going to run into her car. (R. 467/91). Nicole turned and walked back to the Defendant's truck. (R. 467/91). When Nicole got back to the truck, the Defendant handed her his cell phone and told her Zach Leifson was on the phone. Nicole had met Zach on one prior occasion. She testified that Zach was one of the Defendant's "gang member brother, partners, friends." (R. 467/92). She asked Zach to tell the Defendant to leave her alone. (R. 467/92). The Defendant took the phone back from her. (R. 467/93)

They drove to Weber Canyon and then traveled east through Morgan County. (R. 467/95). While they were traveling, Nicole called another co-worker to make sure her shift was covered because she was "terrified that I'd lose my job." (R. 467/96). While she was on the phone with her co-worker,

the Defendant pulled out her pocketknife and told her if she did anything stupid she was going to get it. (R. 467/97). They also had a conversation where the Defendant told her he had a dream where he was going to kill her and then himself, and that's what he was going to do. (R. 467/101).

The Defendant was running low on gas so he pulled into a gas station at Silver Creek Junction. (R. 467/99). Nicole told him that she needed to go to the bathroom. (R. 467/99). The Defendant made her promise she would return to the truck. When the truck stopped she opened the door and walked into the gas station. (R. 467/100). She walked into the bathroom and stayed in there for ten to fifteen minutes. (R. 467/100). She eventually walked out of the bathroom. The Defendant was standing by the counter. He approached her and said, "Come on, let's go." (R. 467/102). She said "okay" and he turned to walk out the door. She noticed that there were some steps and she ran up the steps as fast as she could go. (R. 467/103).

There were some showers up the stairs, and Nicole hid in one of the showers. (R. 467/105). She was in the shower for approximately twenty minutes before she came out. (R. 467/106). She looked out a window and noticed the Defendant's truck pulling into one of the parking stalls. (R. 467/108-9). She ran back into the shower and stayed there another twenty

minutes. (R. 467/109). She looked out the window again and noticed the Defendant's truck driving away. (R. 467/109-10).

She came down the stairs and was told by someone working at the counter that he was gone. She started bawling and then began calling friends. (R. 467/110). Eventually the police were called and someone picked up Nicole and took her to the Summit County Sheriff's Office. (R. 467/111-13). Nicole was questioned at the sheriff's office. She didn't want the Defendant caught so she spelled his name wrong. She didn't tell them anything about Justin Pedockie's involvement. (R. 467/113).

There were pictures taken of Nicole at the sheriff's office. She had scratches on her neck and a mark above her eye. (R. 467/115). A friend picked her up from the sheriff's office and drove her back to Ogden. (R. 467/117). The next day Nicole obtained a protective order. She was told by a judge that he wouldn't sign it unless she talked to someone at the Ogden Police Department, which she eventually did. About a week after that she talked to Detective Hansen from the police department. (R. 467/117-20).

She was asked to fill out a written statement which she decided against doing. (R. 467/120). She eventually talked to Detective Hansen about what happened and agreed to give a written statement. (R. 467/121).

Zach Leifson testified for the State. He knew the Defendant from prison where they were cellmates. (R. 467/209). Zach had talked to the Defendant on the phone during the time Defendant had Nicole. The Defendant told Zach that he had Nicole and it had gone wrong and asked what he should do. Zach told him to let her go and she wouldn't call the police. (R. 467/217). Zach also talked to Nicole. Zach testified that Nicole sounded scared, and she had said, "he's going to kill me. They tried to kill me. Help me." (R. 467/218). Zach told her to tell the Defendant that if he would let her go she wouldn't call the police. Zach testified that he thought this was good advice because if she called the police it would become "a whole gang situation." (R. 467/218-220).

After Nicole had gotten away, the Defendant called Zach and told him he had some stuff he needed to get rid of. (R. 467/223). About an hour later the Defendant arrived at Zach's residence in Payson. The Defendant had a pair of shoes, a phone, a pocket knife and a beanie that he wanted to get rid of. (R. 467/226). The Defendant then drove Zach out to Zach's in-laws farm. The Defendant told Zach that he and Justin had taken Nicole out there to shoot her and they were going to drop her in the well and she tried to get away. (R. 467/234-6).

About a month later Zach called the Ogden Police Department and reported what the Defendant had told him. (R. 467/245). He met with

Detective Hanson and gave a recorded statement. (R. 467/245-8). After Zach gave Detective Hanson the statement he decided to not cooperate with the State. He testified that this was the result of threats made against him. (R. 467/248).

Zach testified that Karen (the Defendant's wife) and Kami (Zach's ex-wife and Karen's sister) told him that if he testified he'd die. (R. 467/249). These statements were objected to by defense counsel, but overruled. (R. 467/248). Zach testified that he was worried because of "the gang." (R. 467/250).

Prior to the first trial Zach had been telling people that he wasn't going to testify. Karen had him sign a notarized statement that she said would get him out of testifying. (R. 467/254). Zach testified that he didn't write or read the statement. He testified that he just signed it. The statement read that he was threatened by the prosecutor that he would go back to prison if he didn't cooperate. The statement also says that he originally gave a false statement because he did not want to go back to prison. (R. 467/257). Zach testified that he signed the statement so the threats would go away. The first time he read the statement was at the first trial when the Defendant presented it to him to read. (R. 467/262-4).

After the State finished questioning Zach, the jurors were allowed to ask questions. One of them asked Zach if he feared gang retaliation. He answered, “yes.” (R. 467/271).

Justin Pedockie also testified for the State. He testified that he and the Defendant grew up together until the Defendant went to prison. He testified that he was in on the plan to go to Ogden, kidnap Nicole, take her to Payson, put her in a well and shoot her. (R. 469/21).

Justin was arrested and charged with Aggravated Kidnapping. (R. 469/101). After he was arrested he gave a statement that they went to a hockey game and then went to Karen’s and spent the night. (R. 469/102). After the preliminary hearing the State offered Justin a deal. They offered a plea bargain if he would cooperate with the State. (R. 469/103). The deal that was offered to Justin was that the first degree felony would be reduced to a class A misdemeanor, and the prosecutor would recommend no jail time. (R. 469/104-06).

As part of the deal, Justin had to make a statement to the detective. He later approached the prosecutor and told her that the statement wasn’t correct. (R. 469/107). In the original statement Justin took most of the blame, and said it was his idea, that he was the one who was going to kill her. (R. 469/108).

SUMMARY OF ARGUMENTS

The Defendant's constitutional right to a fair trial was violated. There were several instances where the trial court abused its discretion by allowing the State to introduce prejudicial evidence against the Defendant. The trial court allowed the State's witnesses to testify about Defendant's prior history of being in prison and being in a gang known for retaliation. This information was extremely inflammatory and certainly prejudiced the jury as evidenced by the questions to the witnesses as to whether they feared retaliation for testifying. This prior bad act evidence didn't help prove any of the non-character elements envisioned by Rule 404(b) of the Utah Rules of Evidence and was only used to show that Defendant had a bad character and was acting in conformity therewith.

When the trial court sentenced the Defendant the second time it didn't give him credit for time served. The first time the Defendant was sentenced the court gave him credit for time served. The second, more severe sentence, violated the Defendant's due process rights by punishing him more severely after he was successful in overturning his first conviction.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S PRIOR BAD ACTS.

Prior to the trial, the Defendant filed a motion in limine. In the motion, the Defendant moved the court for an order prohibiting the State from discussing that Defendant had been in prison, had been on parole, was a participant with the Soldiers of Aryan Culture, that he had a history of domestic violence, or that he had solicited another person to threaten the alleged victim. (R. 646).

The trial court did not issue written findings of fact and conclusions of law on this issue. The Court did rule from the bench and denied the Defendant's motion. In its ruling the trial judge stated;

You know, normally evidence about him being in prison or on parole or belonging to SAC would not be relevant, but in this case it just seems it is because it explains how they met, why she was afraid of him, and I just – I don't know how you try the case because of the relationship and the setting in which they met and leave that out. It just – the jury is not going to have a correct picture of the relationship and what went on here. So I'm going to deny the motion in limine.

It just seems to me it's being offered to explain how they were together, how they met, how they knew each other, what the relationship was, then it becomes extremely relevant in trying to figure out what she did, what he did, and why they reacted the way they did during the course of the kidnapping or the alleged kidnapping here. It also explains why she

was afraid of the defendant, why she was afraid to call the police. And, again, it does seem to be relevant in this particular case. (R. 898/26-27)

The State was allowed to introduce prior bad act evidence against the Defendant, and it became a central theme to the State's case. From the beginning of Nicole's testimony it was emphasized that Defendant was in prison when they met. (R. 467/58-63). She also testified that she was hanging out with people who were in and out of prison, and she knew "what they did to people who called the police, so I was scared." (R. 467/81-82). Nicole was asked if she feared retaliation. She answered; "Yeah. He was in a gang in prison, and I hung out with prior to this quite a few of the other people that were in the prison and I knew, you know, what they were all capable of doing and what they did to what they call snitches at the time." (R. 467/82). Nicole also testified that she contacted an individual named Casey Weaver. She contacted Mr. Weaver for advice because he was in the same gang as the Defendant. (R. 467/206)

Zach Leifson was allowed to testify that he met the Defendant in prison when they were cellmates. (R. 467/209). Zach testified that he told Nicole to tell the Defendant that she wouldn't call the police. He thought this was good advice because if she called the police it would become "a whole gang situation." (R. 467/218-20). Zach testified that there was a time when he wasn't going to cooperate with the State because Defendant's wife and Zach's

ex-wife told him that if he testified he'd die. (R. 467/249). Zach testified that he was worried because of "the gang." (R. 467/250).

Justin Pedockie testified that he grew up with the Defendant until the Defendant went to prison. (R. 469/8). After Justin finished testifying the jurors were allowed to submit questions and one of them asked Justin if he feared gang retaliation. He answered, that he did. He followed that up with "I—I don't fear it. I mean, I—I know that they want to, but I'm not afraid of them, I guess you would say. I don't care anymore." (R. 469/195-96) Defendant's attorney objected to the question and was apparently overruled at a sidebar before the question was answered. (R. 469/195-98) Likewise, jurors also submitted similar questions for Nicole and Zach.

Nicole was asked if she still felt threatened. She answered, "Yeah. I do a lot of things to make sure that I'm safe all the time. (R. 468/233). Zach was asked if he feared gang retaliation today. He answered, "Yes." (R. 467/271).

This prior bad act evidence as well as the retaliation speculation was highly prejudicial to the Defendant. It only served to inflame the jury and show that he has a bad character. In *State v. Johnson*, 748 P.2d 1069 (Utah 1987), the Utah Supreme Court stated that "this Court has repeatedly held that evidence of other crimes may not be admitted to prove that the defendant has a bad character or a disposition to commit the crime charged." *Id.* at 1075.

Rule 404(b) of the Utah Rules of Evidence states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of 402 and 403. U.R.E. 404(b)(2002).

In *Johnson*, the Supreme Court held that “[t]o give meaning to the policy embodied in Rule 404(b), evidence of other crimes must be reasonably necessary and highly probative of a material issue.” *State v. Johnson*, 748 P.2d at 1075.

The Defendant’s prior bad acts didn’t help show any of the non-character purposes envisioned by Rule 404(b). In *State v. Featherson*, 781 P.2d 424 (Utah 1989), the Utah Supreme Court held that for prior bad acts to be admissible at trial, there had to be “a special relevance to a controverted issue and is introduced for a purpose other than to show the defendant’s predisposition to criminality.” *Id.* at 426.

The fact that Defendant had been to prison and was in a gang had no relevance to the charge of Aggravated Kidnapping. The elements of Aggravated Kidnapping as they were listed in the Information are that the Defendant; intentionally or knowingly, without authority or law and against the

will of the victim, Jeanette Sather, by any means and in any manner seized, confined, detained, or transported the victim:

(a) and in committing, attempting to commit, or in the immediate flight after the attempt or commission of the kidnapping, the actor possessed, used, or threatened to use a dangerous weapon as defined in Utah Code § 76-1-601; and/or did intentionally aid, assist, encourage, command, or solicit another to do the same. (R. 001).

The fact that Defendant was in prison when he and Nicole met nor the fact that he was in a gang helped establish any of the elements of Aggravated Kidnapping. The State didn't need that evidence to prove any of the elements of the offense. How and where Nicole met the Defendant didn't assist the trier of fact in any way other than to show that Defendant had a questionable character. Furthermore, the fact that Defendant was in a gang was not relevant and did not assist the State in proving any of the elements. The speculative nature of retaliation was a constant theme that was extremely prejudicial to the Defendant.

A. ANY PROBATIVE VALUE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

Even if evidence of other crimes has relevance beyond proving mere criminal disposition, it is still subject to the protections of Rule 403 of the Utah Rules of Evidence. *State v. Cox*, 787 P.2d 4, 5 (Utah Ct. App. 1990). The

factors a court should consider when weighing the probative value of prior conviction evidence against its prejudicial effect are “the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.” *Id.*

The trial Court did not do a Rule 403 analysis. The Court failed to address the similarities between the Defendant’s bad acts, the interval of time between the crimes, the need for the evidence and the effect the evidence would have on the jury. Since the trial court failed to engage in a Rule 403 analysis, this Court should reverse Defendant’s conviction.

B. IT WAS REVERSIBLE ERROR TO ADMIT THE
DEFENDANT’S PRIOR BAD ACTS INTO EVIDENCE.

In order to constitute reversible error, the error complained must “be sufficiently prejudicial that there is a reasonable likelihood of a more favorable result for the defendant in its absence.” *State v. Bruce*, 779 P.2d 646, 656 (Utah 1989). In *State v. Cox*, this Court stated that “[a]lthough the State presented evidence on which might be sufficient to sustain a rape conviction, we are nevertheless persuaded that the jury may have reached a different result in the absence of the highly prejudicial evidence of the prior sexual assaults.” *State v. Cox*, 787 P.2d at 7.

Informing the jury that the Defendant had previously been to prison and was a member of gang that was known to retaliate was highly prejudicial. If the “taint” caused by inadmissible evidence is sufficient, “it is irrelevant that there is sufficient untainted evidence to support a verdict.” *State v. Mitchell*, 779 P.2d 1116, 1122 (Utah 1989). Because the prior bad act evidence is so highly prejudicial, the Defendant’s conviction should be reversed and the Defendant should receive a new trial.

II. THE TRIAL COURT ERRED WHEN IT DIDN’T RECOMMEND THAT DEFENDANT BE GIVEN CREDIT FOR THE TIME HE HAD SERVED.

Following Defendant’s first conviction he was sentenced on February 12, 2003. The trial court sentenced the Defendant to ten years to life at the Utah State Prison. The court also ran the sentence consecutive to a sentence the Defendant was already serving. (R. 901/8-10). The trial court also gave the Defendant credit for the time served. (R. 901/10).

When the Defendant was re-sentenced following the reversal of his conviction by this Court and his subsequent jury trial, the trial court again imposed a ten year to life sentence to be run consecutive to the prior sentence. However, during the second sentence the trial court did not give the Defendant credit for the time served. This sentencing occurred on April 4, 2007. The Court was asked by the clerk if there was credit for time served. The trial

judge specifically stated that there was to be no credit for time served. (R. 92/20). In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Supreme Court held that when resentencing a defendant, due process prevents the judge from increasing the sentence if the increased sentence is motivated by vindictiveness. In *State v. Sorensen*, 639 P.2d 179, (Utah 1981), the Utah Supreme Court discussed the requirements of due process and U.C. A. §76-3-405. The Utah Supreme Court held that this section prevents the Utah constitutional right to appeal from being impaired “by imposing on a defendant who demonstrates the error of his conviction the risk that he may be penalized with a harsher sentence for having done so.” *Id.* at 180.

U.C.A. §76-3-405 limits a defendant from receiving a harsher sentence following a successful appeal. It reads;

- (1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.
- (2) This section does not apply when:
 - (a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence.

The State attempted to get the trial court to sentence the Defendant to an increased sentence of fifteen years to life. The prosecutor alleged that facts

that were not known to the trial court at the time of sentencing would justify an increased sentence. (R. 902/12-15). The trial court carefully considered those factors and found that there was no new information that would justify an increased sentence. (R. 902/16-20).

However, after making that specific finding, the trial court did impose a sentence that was more severe than the first one. On February 12, 2003, when the Defendant was initially sentenced, he was given credit for time served. (R. 901/10). On April 4, 2007, when the Defendant was sentenced the second time the Court refused to grant credit for time served. (R. 902/20).

This resulted in a more severe sentence in two ways. First, the Defendant didn't receive credit for the time he was incarcerated waiting trial and sentencing. Second, due to the time frames associated with the appeal and second trial, over four years elapsed between the first and second sentences. By not receiving credit for the time served, the Defendant served an additional four years without credit for successfully winning the first appeal. Due process and Utah's statutory prohibition prevent such a result. "In the context of the due process requirement of *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, which seeks to assure that there is no chilling or deterring of the criminal defendant's exercise of his basic constitutional right to appeal, and in light of the Utah constitutional constraint against impairing the right to appeal, . . . we


think the meaning of our statutory prohibition against a ‘more severe’ second sentence is clear. The second sentence cannot exceed the first in appearance or effect” *State v. Samora*, 2002 UT App 384 ¶11

Defendant’s second sentence exceeded his first sentence. He did not receive credit for the initial time he was in custody awaiting the first trial, and then he lost an additional four years of credit as a result of his successful appeal. Due process prohibits such a result. For these reasons, the Defendant respectfully requests that if his conviction is upheld that the matter be remanded to the trial court for re-sentencing.

CONCLUSION

The State used improper character evidence throughout the Defendant’s trial. This evidence was not relevant to any of the elements of Aggravated Kidnapping and was only used to show that Defendant had a bad character and acted in conformity therewith. This evidence was highly prejudicial and certainly could have impacted the jury’s verdict. Based on these reasons, the Defendant respectfully requests this Court to reverse his conviction and grant him a new trial. In the alternative the Defendant asks this Court to remand the matter back to the trial court to have the sentence amended so that he receive credit for the time he has served.

DATED this 3rd day of March 2008.


DEE W. SMITH
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Ryan Tenney, Assistant Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 3rd day of March 2008.


DEE W. SMITH
Attorney at Law

ADDENDUM A

2007 APR - 6 P 3:24

SECOND DISTRICT COURT - OGDEN
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCING
 : JUDGMENT AND COMMITMENT
 :
vs. : Case No: 011900689 FS
 :
ROBERT BRIAN PEDOCKIE, : Judge: ERNIE W JONES
Defendant. : Date: April 4, 2007

PRESENT

Clerk: vennaw
Reporter: COVINGTON, TRACY
Prosecutor: BEATON, BRENDA J
Defendant
Defendant's Attorney(s): LAKER, STEPHEN A
Agency: Adult Probation and Parole

DEFENDANT INFORMATION

Date of birth: December 19, 1969
Video
Tape Number: EWJ 040407 Tape Count: 3:24

CHARGES

1. AGGRAVATED KIDNAPPING - 1st Degree Felony
Plea: Not Guilty - Disposition: 02/20/2007 Guilty

HEARING

COUNT: 3:24

This is the time set for sentencing, scheduled one week early due to the defendant submitting a written letter demanding to be sentenced within 45 days. The defendant is present and represented by Stephen Laker, public defender.

Brenda Beaton is present representing the State of Utah. It is noted that the State filed a sentencing brief, and the defense has not yet responded to the brief. Mr. Laker indicates that the defendant does not wish for him to speak at sentencing.

The Court inquires as to whether the defendant wishes to be sentenced today or allow the defense time to respond to the State's brief. The defendant asserts that he desires to be sentenced today



CD19556536
PEDOCKIE, ROBERT BRIAN
011900689

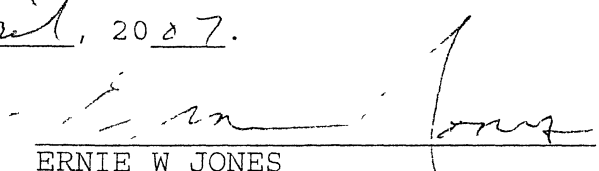
Case No: 011900689
Date: Apr 04, 2007

and does not wish to have a public defender. He further requests transcripts of all hearings, which the Court denies at this time, informing the defendant that he can request transcripts once a formal appeal has been filed. The defendant is informed he has 30 days from the date of sentencing to file an appeal. The Court declines to release the Public Defender's Association at this time, and this matter is passed so that Mr. Laker can discuss the contents of the presentence investigation report with the defendant.

COUNT: 3:37

Case is recalled. Attorney Beaton addresses the Court regarding the defendant's right to counsel or right to represent himself at sentencing. The defendant again asserts that he wishes to be sentenced today, and indicates he believes his constitutional rights were violated by his not being sentenced at the time his conviction entered. Attorney Beaton addresses the Court regarding the State's brief, and her argument that the Court impose a greater sentence of 15 years to life than was originally imposed. The Court denies the motion for a fifteen-to-life sentence, and imposes a sentence of ten years-to-life, to be served at the Utah State Prison. The sentence shall run consecutively with the sentence the defendant is currently serving and credit for time previously served is denied by the Court. The defendant is further ordered to pay full restitution in this case, to be determined by the Board of Pardons.

Dated this 4 day of April, 2007.



ERNIE W JONES
District Court Judge

ADDENDUM B

1 do any good and won't make any sense. And, frankly, it would
2 be a miscarriage of justice in terms of trying to get a jury
3 to be impartial but to listen to the evidence and all of the
4 evidence fairly. If they don't have it all to listen to then
5 we have no way of knowing what kind verdict they will give us
6 and we have no guarantee it will be just.

7 **THE COURT:** All right. Mr. Barr?

8 **MR. BARR:** Can I just respond on a couple of things?
9 I think that's what the essence of what she's saying is we
10 need to have this evidence so the jury knows who he is,
11 that's what the character evidence is. That's the very
12 purpose she wants to get it in there is character evidence,
13 not because there's some motive or intent there.

14 I think the other thing is -- and what he's telling me
15 regarding that other person and I don't know if we have to
16 have another hearing regarding that, but it seems he says
17 that this incident regarding the shooting of another man
18 happened back in 1992. And it wasn't that he shot the girl
19 or threatened the girl, which is what this case is about.
20 And he also said it wasn't because it was a jealousy thing,
21 it was a drug incident which is totally unrelated to what
22 this case is about. So even if that's all so, then that
23 should -- has no relationship at all to what this case is
24 about.

25 **THE COURT:** All right. You know, normally evidence

1 about him being in prison or on parole or belonging to SAC
2 would not be relevant, but in this case it just seems it is
3 because it explains how they met, why she was afraid of him,
4 and I just -- I don't know how you try the case because of
5 the relationship and the setting in which they met and leave
6 that out. It just -- the jury is not going to have a correct
7 picture of the relationship and what went on here. So I'm
8 going to deny the motion in limine.

9 It just seems to me it it's being offered to explain how
10 they were together, how they met, how they knew each other,
11 what the relationship was, then it becomes extremely relevant
12 in trying to figure out what she did, what he did, and why
13 they reacted the way they did during the course of the
14 kidnapping or the alleged kidnapping here. It also explains
15 why she was afraid of the defendant, why she was afraid to
16 call the police. And, again, it does seem to be relevant in
17 this particular case.

18 On the question of the prior shooting, again, it goes to
19 her knowledge and her mindset and how she felt about the
20 defendant and why she was afraid and why she took his threats
21 seriously when he said he was going to kill her because she
22 knew about an earlier incident. It doesn't matter whether it
23 was 1992. Her understanding was that he had tried to kill
24 somebody else with a firearm and there are some real
25 similarities between that incident and what happened in this

1 case. So, again, I think it becomes relevant because it
2 shows what's going on in her mind and her response to what
3 he's doing.

4 And finally, on the question of Paul Bushell, it seems to
5 me that that is his testimony about being solicited by the
6 defendant to threaten the victim, again, becomes relevant.
7 And as I understand it, the defense is really not objecting
8 to that as long as Mr. Bushell is here to testify.

9 All right. Anything else on that motion that I need to
10 address or clarify?

11 **MR. BARR:** I guess -- Your Honor, I was trying to
12 listen to you, honestly, and he's whispering.

13 **THE COURT:** I know. I know.

14 **MR. BARR:** And I guess what he was whispering to me
15 while you were talking is regarding the incident back 1992,
16 he says his conviction was for possession of a firearm by a
17 restricted person. He did not get convicted of shooting this
18 guy, it was aggravated or assault or anything like that,
19 because it was a self-defense issue, it was regarding that he
20 had a weapon.

21 **THE COURT:** It's not the conviction that is
22 critical. What is critical here is what she believed
23 happened. And what she's saying is, hey, he went after
24 somebody else with a shotgun and it had to do with a
25 relationship with his girlfriend or ex-wife or whatever, and

ADDENDUM C

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IN THE SECOND DISTRICT COURT OF WEBER COUNTY
2007 MAR 15 PM 6:29

STATE OF UTAH

***** MAR 21 2007

STATE OF UTAH,)	
)	
Plaintiff,)	REPORTER'S TRANSCRIPT
)	
vs.)	CASE NO. 011900689
)	
ROBERT BRIAN PEDOCKIE,)	
)	
Defendant.)	

SENTENCING

FEBRUARY 12, 2003

HONORABLE ERNIE W. JONES

APPEARANCES:

FOP THE STATE:	MS. CAMILLE L. NEIDER
FOR THE DEFENDANT:	MS. SHARON L. PRESTON

***** FILED
UTAH APPELLATE COURTS
SEP 06 2007

20070375-CA

ORIGINAL

P R O C E E D I N G S

THE COURT: Let's see. This is State of Utah versus Robert Pedockie, case ending in 0689. And this is the time for sentencing on the charge of aggravated kidnapping.

And, let's see, Ms. Neider, you're here on behalf of the State?

MS. NEIDER: I am, Judge.

THE COURT: And are you Ms. Preston?

MS. PRESTON: Yes.

THE COURT: All right. And, Ms. Preston, you've filed an appearance on this case?

MS. PRESTON: Yes.

THE COURT: All right. This was the time set for sentencing, and we have Mr. Pedockie present.

Did you get a copy of the presentence report?

MS. PRESTON: Yes, we did.

THE COURT: In fact, my recollection is this was actually scheduled for sentencing a couple of weeks ago and we set this over at your request; is that right?

MS. PRESTON: That's correct. Yes.

THE COURT: So you could go over the report?

MS. PRESTON: Yes.

THE COURT: Before we get started, let me just indicate, too -- and I'll be glad to hear from both sides -- but as I understand it, under the law this is a mandatory

1 prison sentence.

2 Is that your understanding?

3 MS. PRESTON: That's -- yes, that's our
4 understanding.

5 THE COURT: Okay. All right. Is there any legal
6 reason why we shouldn't impose sentence?

7 MS. PRESTON: No, there is not.

8 THE COURT: All right. Anything you want to say as
9 far as recommendations or comments?

10 MS. PRESTON: Your Honor, I think the -- counsel's
11 advised me that the victim wants to address the Court, and
12 we'd like to reserve -- reserve our -- our brief statement.

13 THE COURT: Do you want to hear from the victim
14 first?

15 MS. PRESTON: Yes.

16 THE COURT: All right. All right. Did the victim
17 want to be heard then?

18 MS. NEIDER: She does, Judge. She has a statement.
19 I don't know if she's going to read it or --

20 THE COURT: All right. Did you want to come up,
21 Ma'am?

22 All right. Again, would you give us your name?

23 MS. SATHER: It's Jeanette Nicole Sather.

24 THE COURT: Jeanette?

25 MS. SATHER: Uh-huh.

1 **THE COURT:** Okay. All right. Go ahead, if you'd
2 like.

3 **MS. SATHER:** I just want to take a few moments to
4 express how being the victim in this aggravated kidnapping
5 case has affected me and my life.

6 Every day I live with the fear that Robert has sent or
7 will send someone to retaliate against me for turning him in.
8 Because of this fear, I've put an alarm on my house and even
9 gone to the extent of trying to sell my home and move away
10 from Utah just to feel safe again.

11 My ability to trust men has suffered immensely and this
12 makes having a normal social life very difficult. It's been
13 over two years and I still have nights that I don't sleep
14 because of the fear Robert's created in my life and the
15 nightmares I have of Robert and things he's done and said to
16 me. I'm trying to work through some of these issues that
17 he's caused in my life, but there are many memories that will
18 not be able to -- that I will not be able to forget.

19 Robert has expressed to others that if he's sent to
20 prison because of what he did to me that he will kill me or
21 have someone else take care of or hurt me. I honestly feel
22 these threats are true. Robert has a strong history of
23 violence and I feel that he will follow through with these
24 threats.

25 I feel if Robert is ever allowed to return to the

1 community, he will be violent again, if not towards me, to
2 someone. And his next victim may not be as lucky as I and
3 get away.

4 Robert shot a man out of jealousy, kidnapped and almost
5 killed me out of obsession and jealousy. I feel that he will
6 eventually kill someone because of these dangerous
7 personality traits. Robert should be locked away from
8 society for a very long time so that he can be rehabilitated
9 so he will not hurt or kill anyone else.

10 Thank you for your time.

11 **THE COURT:** All right. And, Ma'am, you understand
12 what I said earlier? Under the law, it's -- a prison term is
13 mandatory. He can't get probation on this case.

14 **MS. SATHER:** Yes.

15 **THE COURT:** Even if I wanted to give him probation.

16 **MS. SATHER:** I understand.

17 **THE COURT:** Do you understand that?

18 **MS. SATHER:** Uh-huh.

19 **THE COURT:** Okay. All right. Thank you.

20 Did you want to make that part of the file then?

21 **MS. SATHER:** Yeah.

22 **THE COURT:** Okay. All right. And, Ms. Neider,
23 anything you wanted to add?

24 **MS. NEIDER:** Judge, just briefly. I know it's been
25 quite a while since we have been here on this case in terms

1 of substantive issues.

2 THE COURT: Okay.

3 MS. NEIDER: But I know the Court's familiar with
4 the facts of the case, but I think that Ms. Sather is lucky
5 to be alive. And that this situation was a serious one,
6 Judge.

7 The choices for the Court -- and I know that the PSI is
8 not really specific in terms of other than following the
9 statutory language.

10 THE COURT: Well, isn't the report wrong? It says
11 five to life.

12 MS. NEIDER: It says on the front page --

13 THE COURT: As I read the statute, it says six, ten
14 or --

15 MS. NEIDER: Fifteen.

16 THE COURT: -- fifteen. Yeah.

17 MS. NEIDER: That is true, Judge. It is a six, ten,
18 or a fifteen. And it's the State's position that -- that the
19 Court should sentence him to ten to life, consecutive to the
20 sentence that he's already serving down at the prison. I
21 think that the prison -- that will give them the opportunity
22 to keep a handle on him for a very long period of time, which
23 I think is necessary.

24 The presumption is that it run consecutive because he
25 was on parole, and I think that's -- there's no reason to

1 deviate from that in this case, especially considering that
2 he had only been on parole for about three and a half months.
3 It wasn't that he had had an extended period of time that he
4 had been behaving or anything like that. He had been out for
5 a very short period of time, was adjusting, and I think went
6 off the deep end in a significant way when it came to this
7 case. I think the only way the Court could justify running
8 anything concurrent would be to give him the 15 to -- 15 to
9 life, concurrent. But it is the State's position that this
10 case warrants a ten to life, consecutive.

11 I think based on the history of this case that the
12 Court's so familiar with that Mr. Pedockie has never
13 expressed any remorse for what has happened. He has never
14 apologized to the victim and I don't think he probably
15 intends to do that today. He has been focused on working the
16 system, manipulating the Court, manipulating the -- the
17 county attorney's office, in an attempt to try and make this
18 go away. And -- instead of standing up for what has happened
19 and really accepting responsibility for what he did that
20 night. He's never done that. Judge, I think that that
21 definitely counts against him.

22 So the State's position is the ten to life, consecutive,
23 and we would ask the Court to follow that.

24 **THE COURT:** All right. Thanks, Ms. Neider.

25 All right. Anything from the defense then, Ms. Preston?

1 MS. PRESTON: We'll submit it, Your Honor.

2 THE COURT: Okay. Anything Mr. Pedockie wants to
3 say or --

4 THE DEFENDANT: No.

5 THE COURT: All right. Well, as I mentioned before,
6 it -- it seems clear to me under the statute that a prison
7 term is mandatory as I read 76-5-302. And it also
8 indicates -- I think there was another section in the Code,
9 76-3-406 that it says essentially the same thing: Probation
10 shall not be granted for a conviction for aggravated
11 kidnapping. The sentence can't be suspended. Judgment can't
12 be entered for a lower category of offense. And
13 hospitalization cannot be ordered under 76-3-406.

14 So I -- I suppose the only real questions are whether it
15 be for a minimum of six, ten, or fifteen, and the other
16 question is whether or not it run concurrent or consecutive.

17 So I think based on the evidence that I've heard and the
18 arguments presented, Mr. Pedockie, it will be the sentence of
19 the Court then on the charge of aggravated kidnapping, a
20 first degree felony, that you serve a minimum of ten years,
21 not less than life.

22 I'm going to base the ten-year minimum on the fact that
23 a gun was used. I realize you didn't pull the trigger when
24 the gun was fired, but as Ms. Neider pointed out, this victim
25 is -- is so lucky to be alive. I mean, anyone who saw the

1 photographs, I mean, that bullet goes right through the back
2 of the pickup, goes right through the seat where she's
3 sitting, and how it ever missed her, it's just a miracle.

4 But I think the fact that a firearm was used, and then I
5 believe there was evidence that you had threatened her on
6 several different occasions. You told her, you're dead; or
7 if you don't go with me, you're going to be killed. I think
8 there was some evidence about a knife, maybe a pocket knife
9 being used or displayed, too.

10 And I think for those reasons, the fact that the gun was
11 used and there was threats made to her life, that the minimum
12 of ten years is appropriate in this case.

13 I am going to run this sentence consecutive, however,
14 with the time you're already doing at the Utah State Prison.
15 You -- you hadn't been out of -- or off -- out of prison very
16 long when this occurred. And so, obviously, you -- you
17 hadn't learned anything, I guess, from the last time you were
18 there at the prison. So I'll run this sentence consecutive
19 with the one you're already doing on the other offense.

20 I'm also going to recommend that you be required to pay
21 restitution for all expenses incurred as a result of this
22 offense to the Office of Victim Reparation and for any
23 out-of-pocket expenses that may have been incurred by the
24 victim on this case for therapy.

25 And I believe that's it. Anything else?

1 MS. NEIDER: No, Judge.

2 THE COURT: Anything else from the defense?

3 MS. PRESTON: Your Honor, I just have a brief thing
4 to address. Mr. Pedockie's requested that -- he requested
5 transcripts for every proceeding that's -- not the trial
6 transcripts, but all the other ones.

7 THE COURT: Right.

8 MS. PRESTON: And -- a couple of months ago and he
9 hasn't received those.

10 THE COURT: Okay.

11 MS. PRESTON: And he plans to file a motion for a
12 new trial, and so we need to have that expedited.

13 THE COURT: Okay. All right. I think if you'll
14 just contact the court reporters, they can make arrangements
15 and get you the transcripts for all the hearings. Okay?

16 MS. PRESTON: Okay.

17 THE COURT: All right.

18 THE CLERK: Credit for time served?

19 THE COURT: Yeah. We'll give him credit for time
20 served.

21 MS. PRESTON: Thank you, Your Honor.

22 THE COURT: All right. Thank you.

23 MS. NEIDER: Thank you, Judge.

24 THE COURT: Thank you.

25 (Proceedings conclude.)

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2
3 CERTIFICATE4 STATE OF UTAH)
5) ss.
6 COUNTY OF WEBER)7 I, Laurie Shingle, do hereby certify that the foregoing
8 10 pages of transcript constitute a true and accurate
9 record of the sentencing proceedings to the best of my
10 knowledge and ability as a Certified Shorthand Reporter
11 for the Second Judicial District Court of Weber County
12 in and for the State of Utah.13 Dated at Ogden, Utah, this the 19th day of March,
14 2007.15 
16 Laurie Shingle, RPR, CMRS
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ADDENDUM D

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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
PLAINTIFF,)	
)	
VS.)	REPORTER'S TRANSCRIPT
)	
ROBERT BRIAN PEDOCKIE,)	SENTENCING
)	
DEFENDANT.)	CASE NO. 011900689

HONORABLE ERNIE W. JONES

APRIL 4, 2007

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2007 MAR 19 PM 2:13

APPEARANCES

FOR THE PLAINTIFF: MS. BRENDA J. BEATON

FOR THE DEFENDANT: MR. STEPHEN A. LAKER

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UTAH APPELLATE COURTS
SEP 06 2007

ORIGINAL

2007 0375-CA

P R O C E E D I N G S

THE COURT: This is State of Utah versus Robert Pedockie, it's case 0689.

And, Mr. Laker, you're here on his behalf?

MR. LAKER: I am, Your Honor.

THE COURT: And Ms. Beaton -- or Mr. Daines for the State, for both of you?

MR. LAKER: They're here anyway.

THE COURT: They're here. All right. The reason I put this on the calendar is I think sentencing was actually set out a couple of weeks from now, but Mr. Pedockie sent us a letter indicating he wasn't willing to waive the 45 days and so I just asked my clerk to bring him up because he's entitled to be sentenced within 45 days. And I know, Mr. Laker, you have not had a chance to respond to the State's brief.

MR. LAKER: That's correct, Your Honor. I just -- in fact, I only saw it yesterday, last evening after --

THE COURT: So I guess the question is, does Mr. Pedockie want to be sentenced today or does he want to waive the 45 days now, give you a chance to respond to the State's brief and have us put sentencing on another date?

MR. LAKER: Your Honor, I need to tell the Court that Mr. Pedockie has indicated to me that he has intention of hiring -- to handle the appeal of this case --

1 **THE COURT:** Okay.

2 **MR. LAKER:** -- private counsel and that he has
3 reiterated to me that he doesn't want either myself or
4 Mr. Barr to be representing him. That's all I know at this
5 particular point in time. I know that I have not filed a
6 response to the brief that was submitted by the prosecution.
7 As I indicated, I only received that -- it was mailed on the
8 26th.

9 **THE COURT:** Okay.

10 **MR. LAKER:** But we received it a couple of days
11 after that, I believe.

12 **THE COURT:** Well, I guess what I need to know,
13 though, the answer to my question is, does he want to be
14 sentenced today? Because under the law he has a right to be
15 sentenced within 45 days. I got a letter from him saying he
16 wasn't willing to waive that. I guess I need to know --

17 **MR. LAKER:** I think he's going to have to answer
18 that question --

19 **THE COURT:** Mr. Pedockie, did you want --

20 **MR. LAKER:** -- your Honor, because I can't for him.

21 **THE DEFENDANT:** I just want it on my record that I
22 want all my transcripts, videotapes, and mental health
23 transcripts, everything I've asked Mr. Barr and I told you
24 before the trial even started that these individuals weren't
25 speaking in my behalf, that I actually wanted to fire them

1 and you made me proceed with these individuals, that I have a
2 conflict of interest --

3 **THE COURT:** Okay.

4 **THE DEFENDANT:** -- in already. So, yeah, I don't
5 even want him to speak in my behalf. I just want all my
6 transcripts from day one, from the rest, all the way and
7 video cameras of the trial and everything like that. I've
8 asked several times and I have not gotten any response or any
9 response from any of the --

10 **THE COURT:** Well, see, you don't have to worry about
11 it until once your sentenced, then you've got 30 days to file
12 your appeal. The time doesn't run until after you're
13 sentence so that's where we're at right now.

14 **THE DEFENDANT:** Well, let's get it going so I can
15 get the appeal on the way.

16 **THE COURT:** Well, that's what I want to know is that
17 under the law you have --

18 **THE DEFENDANT:** And you guys violated my
19 constitutional rights and I want to be sentenced. I asked to
20 be sentenced the day of trial when it was over and I don't
21 even know why you proceeded to let these individuals to talk
22 in my behalf.

23 **THE COURT:** So you want to be sentenced today?

24 **THE DEFENDANT:** Yes, I do.

25 **THE COURT:** Okay. The State want to be heard? I

1 know we originally were thinking about that and then you said
2 you wanted to brief it. I've got your brief.

3 **THE DEFENDANT:** Your Honor, I also --

4 **THE COURT:** Do you want to proceed with sentencing
5 today?

6 **MS. BEATON:** We're fine with sentencing today.

7 **THE DEFENDANT:** Your Honor, I also want a copy of
8 the sentencing today too.

9 **THE COURT:** That's why we have the court reporter
10 here so --

11 **THE DEFENDANT:** No. I want a copy of the -- because
12 I want to show vindictiveness of how she's trying to up the
13 ante on this which is violating my other rights for appeal.

14 **THE COURT:** All right. Did you get a copy of the
15 presentence report, Mr. Laker?

16 **MR. LAKER:** I did not, Your Honor.

17 **THE COURT:** Okay.

18 **MR. LAKER:** I think that went to -- probably went to
19 Mr. Barr.

20 **THE COURT:** Oh, okay.

21 **MR. LAKER:** And I just want -- for clarification, I
22 think Mr. Pedockie does not want me to speak in his behalf in
23 any way, shape or form.

24 **THE COURT:** Okay. And I've heard that but I'm not
25 going to release you at this point.

1 **MR. LAKER:** But I don't know whether I should speak.

2 **THE COURT:** Well, as far as I know, you're still on
3 the case. So do you need some time to go over this
4 presentence report with Mr. Pedockie?

5 **MR. LAKER:** Yes, Your Honor, because I haven't yet.

6 **THE COURT:** Do you want to take this one?

7 **MR. LAKER:** May I take that one?

8 **THE COURT:** All right. Let's pass this for just a
9 minute so you can look at the report, Mr. Laker.

10 (A recess was taken.)

11 **THE COURT:** All right. Let's have the record
12 reflect that both parties are here.

13 Mr. Laker, any legal reason we shouldn't impose sentence?

14 **MR. LAKER:** No, Your Honor. Given the
15 representations he's made here today, he wants to go forward
16 with sentencing.

17 **MS. BEATON:** Well, maybe, your Honor, if I could
18 just speak to that one issue for just one second.

19 **THE COURT:** All right.

20 **MS. BEATON:** The story I had originally heard was
21 that the defendant was planning on hiring Greg Skordas to
22 handle the sentencing. When it was quarter after three and I
23 didn't see Mr. Skordas, I called his office to find out if he
24 was coming because Mr. Laker told me that Mr. Pedockie said
25 that's who he had hired.

1 **THE DEFENDANT:** I didn't say that.

2 **MR. LAKER:** That's not what I said. I said that he
3 intends to hire him to handle the -- if it proceeds
4 forward -- from this point forward and then he did not want
5 us, Mr. Barr and myself, to represent him.

6 **THE COURT:** I guess the question is, does he want
7 him here for sentencing or does he just want him on on appeal
8 or do we know?

9 **MR. LAKER:** I think he just wants him here on the
10 appeal.

11 **MS. BEATON:** Well, even as to the appeal I talked to
12 him about that because I -- because his name keeps creeping
13 into this case on a regular basis, and during the trial he
14 indicated that Mr. Skordas was going to come up and represent
15 him pro bono.

16 **THE COURT:** Right.

17 **MS. BEATON:** I've never spoken with Mr. Skordas with
18 regard to that because I obviously had other things to do
19 while we were in the middle of the trial, but I asked him
20 today whether or not that was the case and he said that the
21 defendant's family had contacted him, he has never been
22 retained as counsel to handle the trial. He said he did have
23 a conversation with them that indicated that if the trial was
24 set, he knew from previous dealings with you that you would
25 not be inclined to continue the trial but they said they

1 never retained him anyway. I asked Mr. Skordas whether or
2 not he would have been willing to do it on a pro bono basis
3 because that was the representation we had from the defendant
4 during the course of the trial, and he said absolutely not.

5 I then asked him whether or not he had been retained to
6 handle the sentencing today. He said no. He said he had
7 been contacted again and they wanted to know whether or not
8 he would handle the appeal. He said that he has been
9 contacted once a while back, has never been contacted again
10 by the family and he has not been retained. He has no
11 intention on entering on behalf of this defendant.

12 **MR. LAKER:** At least at this point.

13 **MS. BEATON:** Well, I didn't get that impression, but
14 all right.

15 **THE COURT:** All right. Okay.

16 **MS. BEATON:** And I guess the only issue that
17 Mr. Daines and I have with this is I agree if the defendant
18 wants to be sentenced today. I think that he, like he does
19 at the trial, has the ability to say I want to proceed on my
20 own or if he thinks that he wants to have an attorney
21 represent him and he wants to retain somebody, we think he
22 has that right, but obviously it can't be done today because
23 he has not retained counsel. But in terms of forcing
24 Mr. Laker to represent him on the sentencing, although it
25 might be in his best interest, we think the defendant still

1 has a Sixth Amendment right if he wants to go on his own as
2 to sentencing, we can't force that.

3 Now, I guess the Court could conceivably hear from
4 Mr. Pedockie about sentencing and then if for fun we wanted
5 to hear what Mr. Laker had to say, not necessarily speaking
6 on the defendant's behalf, but just as sort of an added
7 bonus, we could do that.

8 **THE COURT:** For fun? I'm sorry. All right. Well,
9 I guess we just need to know, Mr. Pedockie, do you just want
10 to go forward today with sentencing or do you want to talk to
11 a private attorney first?

12 **THE DEFENDANT:** I want to be sentenced today but I
13 don't think it is any of the prosecutor's business what, how
14 or who I'm going to obtain for a legal counsel and what my
15 family's done, you know what I mean?

16 **THE COURT:** All right. I just think if he wants to
17 be sentenced, that's what the law says, he can be sentenced
18 within 45 days, so let's go ahead and go through with it. I
19 just want to make sure I've got it clear on the record that
20 that's what he wants do.

21 **THE DEFENDANT:** Because, Your Honor, what she said
22 is not true, that's why I don't think --

23 **MS. BEATON:** Mr. Skordas said he was available by
24 telephone if the Court wanted to put him on a telephone
25 conference call as well.

1 **THE DEFENDANT:** Because me and my dad was going to
2 sit down -- I didn't even know we had court today and today
3 was the day we were going to talk to see if we were going to
4 retain him.

5 **THE COURT:** And that's why the question. Do you
6 want to talk to Mr. Skordas --

7 **THE DEFENDANT:** I want to be sentenced. I was
8 wanting to be sentenced before, the day of trial --

9 **THE COURT:** I know.

10 **THE DEFENDANT:** I didn't even want to continue it.
11 You guys already violated -- I wanted to be sentenced that
12 day.

13 **THE COURT:** Well, you have the right to be sentenced
14 in 45 days. You don't necessarily have a right to be
15 sentenced on the day you were convicted.

16 **THE DEFENDANT:** I want to be sentenced within 45
17 days.

18 **THE COURT:** Okay. And that's where we're at right
19 now. So you don't want to talk to Mr. Skordas and you don't
20 want to talk to somebody else before sentencing, right?

21 **THE DEFENDANT:** My phone at the prison aren't even
22 working now due to the fact that -- I believe it's due to the
23 fact that the prosecutor keeps messing around with it and
24 listening to it because my phones won't even accept --

25 **THE COURT:** That's not my question. The question is

1 you don't want to talk to Mr. Skordas or another attorney?

2 **THE DEFENDANT:** I just want to be sentenced.

3 **THE COURT:** Okay. All right. I think we've made a
4 clear record then. Okay.

5 All right. Mr. Laker, any legal reason sentence should
6 not be imposed?

7 **MR. LAKER:** Not on a legal basis.

8 **THE COURT:** Do you have anything you want to say on
9 his behalf?

10 **MR. LAKER:** Only, Your Honor, that the
11 recommendation is pretty much identical to what it was
12 previously.

13 **THE COURT:** Which was the wrong recommendation. It
14 was a five to life, which doesn't apply to this case.

15 **MR. LAKER:** It doesn't apply.

16 **THE COURT:** Which make me wonder if AP&P doesn't
17 just pick up their old presentence report and run it off.

18 **MR. LAKER:** The only thing I would say and I only
19 say this intentionally is that that I -- I don't think the --
20 that there have been additional facts presented that would
21 justify increasing it, and with that I'll --

22 **THE COURT:** All right. Mr. Pedockie, anything you
23 want to say? I take it that's a no?

24 All right. Ms. Beaton?

25 **THE DEFENDANT:** No. I -- just like I said, I don't

1 trust these attorneys and I would like to have an attorney
2 but I want to be sentenced so I can get this on the road.

3 **THE COURT:** Okay. All right. State want to be
4 heard, Ms. Beaton?

5 **MS. BEATON:** We do, Your Honor. You had already
6 indicated that you received the State's sentencing brief.

7 **THE COURT:** I have.

8 **MS. BEATON:** The issue before the Court today is
9 whether or not this ought to be a 6, 10 or 15 commitment and
10 whether or not that charge should run consecutive or
11 concurrent to the current sentence that the defendant is
12 already serving at the Utah State Prison.

13 At this point, it is the State's position, as I'm sure
14 you've read, that the State believes that the sentence should
15 be 15 to life to run consecutive to the sentence that he has
16 now. I'm speaking on behalf of the State of Utah, I'm
17 speaking on behalf of the Ogden City police department who
18 investigated this case, and certainly I'm speaking on behalf
19 of the victim in this case, Nicole Sather.

20 I also had a conversation with Ms. Neider who was here,
21 and although she's not with the county attorney's office
22 anymore, I indicated to her what our position was. She has
23 been aware of the fact that we think there was an error early
24 on when this was originally sentenced. And she had indicated
25 that it was fine with her if I indicated to the Court that

1 she does, in fact, think that the appropriate sentence as
2 well would be 15 to life consecutive, given the nature of the
3 facts of this particular case, given the history that this
4 defendant has, and given the nature of who this defendant is
5 and in weighing the aggravating versus the mitigating
6 factors.

7 Now, the law ordinarily says that you can't impose an
8 increased sentence and I know that was a concern that the
9 Court had initially when we dealt with this. I've provided
10 the Court a copy of the statute that governs this particular
11 issue. If the Court looks at the additional 16 factors that
12 the State has presented for you and you conclude at the end
13 of the day that, one, you think those factors are aggravating
14 in this particular case; and two, you think those are factors
15 that you did not know when you originally sentenced this
16 defendant in 2003, you have the ability at this point in time
17 to impose the 15 to life.

18 Now, the issue as to whether or not it runs concurrent or
19 consecutive, it is the State's position that that
20 determination has been made and it was accurately made the
21 first time. The defendant was on parole and had only been on
22 parole for approximately three and a half months before he
23 did this. In fact, that would be an aggravating factor that
24 the Court could have considered in determining whether the
25 medium level is imposed which would be the 10 to life or the

1 aggravated level in which it would be imposed at the 15 to
2 life.

3 I'm not going to reiterate all of the aggravating factors
4 but I have listed out the aggravating factors that I believe
5 the Court to have known in 2003. The State was only able to
6 come up with two mitigating factors that you knew of in 2003
7 which the State's conclusion is, is that the aggravating
8 factors in 2003 far outweigh the mitigating factors in 2003,
9 but then we've also given you more details about what was
10 going on, because some of you it you heard during the course
11 of the second trial, some of you didn't know about it because
12 adult probation and parole didn't tell you about it or
13 Ms. Neider didn't discuss it with you in any further detail.
14 But at this point in time, you have a copy of the crime that
15 the defendant had been committed to the Utah State Prison
16 with.

17 The defendant at this point in time now qualifies as a
18 habitual violent offender where he did go out and commit any
19 other sort of violent offense. And certainly the nature of
20 the violent offense that the defendant had been committed on
21 and had been on parole on at the time that he committed this
22 crime in 2001, the State certainly thinks is an aggravating
23 factor that the Court should have known more about when you
24 sentenced him in 2003 in which we've certainly given you
25 ample indication of what was going on in 2007 because I

1 actually provided both you and defense counsel a copy of the
2 police reports that talked about that.

3 I also drew the conclusion that there were similarities
4 between those two particular crimes indicating that the
5 defendant is not only a repeat offender in this type of --
6 type of type -- this similar type of crime, but also
7 demonstrated the similarity in these two different types of
8 crimes that were going on, and then the State went on to
9 describe other factors totaling 16 different factors that we
10 think that you and ultimately the Board of Pardons ought to
11 consider when you determine when the defendant ought to be
12 released on this crime.

13 Certainly it is the State's position that this defendant
14 is a danger to the community, the type of crime he committed
15 is the type that ordinarily he ought to be sentenced to a 15
16 to life, and we would ask that that be the sentence that you
17 impose today.

18 **THE COURT:** Ms. Beaton, does the victim want to be
19 heard today at the time of sentencing?

20 **MS. BEATON:** She had indicated to me today that she
21 knows that you had the ability to listen to what she said in
22 2003 and you also got to hear what she testified to at trial
23 that we had in 2007, she wanted -- assuming that you remember
24 the comments that she made at that time, and fully realizing
25 that she's supportive of the State's position that the

1 defendant be sentenced at the 15 to life consecutive, those
2 are the things she wanted you to know and she didn't think it
3 was necessary to speak again today.

4 **THE COURT:** All right. I might indicate I did have
5 a chance to go back and look at the transcript for
6 sentencing. In fact, I think it was part of your exhibit was
7 the sentencing, so that kind of helped me remember what was
8 said at the time of sentencing both by the victim, defendant,
9 and also the prosecutor, Ms. Neider, so that was very helpful
10 to be able to see what information was provided at the time
11 of sentencing.

12 You know, this is a difficult call, because as I read the
13 statute, the defendant was convicted of aggravated kidnapping
14 and he was sentenced to 10 to life and that sentence was
15 consecutive. I imposed that sentence on February the 12th of
16 2003. Ultimately the conviction was overturned by the
17 Supreme Court and it was sent back for a retrial. He was
18 convicted again on February the 20th of 2007, then, of
19 course, the issue then became could I increase the sentence
20 from 10 to life up to 15 to life. And I think the statute
21 that applies here, of course, is 76-3-405 and the general
22 rule is pretty well known and that's the one I relied upon
23 which was that you may not -- a judge may not increase the
24 sentence on a retrial. You can impose a more severe
25 sentence -- because what it appears to be on the surface is

1 that if I increase the sentence that somehow I'm being
2 vindictive because he appealed his conviction.

3 The only exception in there is if there are facts that
4 were not known to the Court at the time of the original
5 sentence, and that's what I'm struggling with is trying to
6 decide whether or not I knew or had access to facts at this
7 sentence that I did not have at the time of the original
8 sentence. And I just want to maybe just take a minute and go
9 through some of the facts, the aggravating factors.

10 One of the facts that the State raised was that I now had
11 more of the details of what happened on his mayhem charge,
12 the one that occurred in January of 1990 where he shot a man
13 in the leg and I guess ultimately the man's leg had to be
14 amputated and it had to do with a woman. Very similar to
15 this situation, apparently he was jealous and got mad at this
16 guy and shot him in the leg and bashed in the windows of her
17 car. But what I do recall, and I wrote it down, is when I
18 looked at the transcript and that was that the victim,
19 Ms. Sather, had talked about that at the time of the original
20 sentencing. She may not have given us the same details that
21 we had now, but there certainly -- I knew about the fact that
22 he had a prior conviction, I knew generally what that
23 conviction involved, the mayhem charge in 1990. So I'm not
24 sure that's a new -- a new fact, something that I was not
25 aware of.

1 The other aggravating factors that you talk about are the
2 tampering with the witness where Nicole was threatened in
3 January of 2001, the threats that were made to Justin
4 Pedockie and Zach Leifson, it appears that that seems to be
5 kind of a never-ending battle.

6 As I recall in the first trial, all of these people
7 mentioned they had been threatened. And again, in 2007 when
8 we do the second trial, again the victims had been
9 threatened. The problem I'm having is trying to link that to
10 the defendant. There's no question somebody's calling,
11 somebody is contacting witnesses and telling them not to
12 testify, but I don't know if this is just a friend or a
13 relative that is just doing this on their own, or whether
14 Mr. Pedockie put them up to it. But from what I gather, I
15 don't remember anybody ever saying that it was Mr. Pedockie
16 who actually called and threatened. In fact, I think Nicole
17 was threatened by a guy named Paul Bushell according to my
18 notes. So, again, I'm having trouble saying that this is a
19 new fact that is attributed -- it certainly would benefit
20 Mr. Pedockie if he was able to convince witnesses not to
21 testify, but I don't know that he actually did that.

22 The other aggravating factor was the recantation by Zach
23 Leifson on April 19th of 2002. Again, that's before he was
24 ever sentenced on the first case, so again, I'm not sure
25 that's new evidence, something new and different to increase

1 the penalties.

2 The one thing that was new was the sham marriage, I
3 guess, as referred to by the State by Karen where she was
4 going to be a witness and then they hurried and got married
5 so the State couldn't call her, but she never testified. So
6 I don't know even if that marriage is a sham, I don't know
7 that it made any difference other than it just shows the type
8 of person we're dealing with. But since the jury never got
9 to hear her testimony, I don't know if it makes any
10 difference whether or not they got married and for what
11 reason. So, again, I don't think that was important.

12 The fire that occurred at the victim's home. I did know
13 about the fire at the time of the original sentence which
14 occurred in November of 2002 and he wasn't sentenced until
15 2003. So, again, I just don't think that's a new -- a new
16 fact that I could consider.

17 And, finally, one of the things the State talks about is
18 the defendant's ability to try to manipulate the court
19 system, about, you know, he keeps firing lawyers, hiring new
20 lawyers, refusing to answer questions, faking illness, trying
21 to delay the trial, again it's just been a continuing episode
22 by him. I mean, it happened in the first trial, it happened
23 in the second trial, but, again, I don't know that it's
24 really new evidence so --

25 I guess what I'm saying is after I consider everything,

1 I'm just not sure that all of this is new evidence that would
2 justify the Court increasing the sentence to 15 to life. So
3 I'm going to deny the State's request.

4 As I say, that's a close call, it really is, I've thought
5 about this for a long time. But I'll just impose the
6 original sentence which was 10 to life and commitment will be
7 forthwith. I do think we can notify the Board of Pardons.
8 Certainly all of this would be relevant on the question of
9 when he's paroled.

10 Anything else? That will be the sentence --

11 **THE CLERK:** Credit for time served?

12 **THE COURT:** No. Not from me, no.

13 **THE CLERK:** So no credit?

14 **THE COURT:** No credit for time served.

15 **MS. BEATON:** And it's consecutive?

16 **THE COURT:** It's consecutive. Uh-huh. All right?

17 Any other questions?

18 **MS. BEATON:** I think there was a restitution amount.

19 **THE COURT:** Oh, there was a restitution. And I will
20 require that he be responsible for restitution. But I don't
21 show an amount here. Do you? So this would be all
22 restitution incurred by the victim in the case.

23 **MS. BEATON:** \$408.92 was paid by the Victim's
24 Reparations Fund.

25 **THE COURT:** All right. Is that the only figure that

1 you're aware of 408?

2 (Ms. Beaton consults with the victim.)

3 **MS. BEATON:** She's talking about time lost from work
4 as a result of being here.

5 **THE COURT:** I don't know, can you recover that? I
6 know you couldn't at one time.

7 **MR. LAKER:** I still don't think you can.

8 **THE COURT:** I wish we could but I don't think we
9 can. All right. That will be the order then.

10 **THE DEFENDANT:** Your Honor, can I get a copy of the
11 sentencing paper today?

12 **THE COURT:** Yeah. Just contact the clerk and
13 they'll get it to you.

14 **THE DEFENDANT:** Can I get a copy today so I can --

15 **THE COURT:** You understand you've got 30 days from
16 today --

17 **THE DEFENDANT:** Yes. I want it on record I am
18 appealing this right now. I want it on record right now.

19 **THE COURT:** It is. It's on the record.

20 (The matter concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
 : SS.
COUNTY OF WEBER)

I, Tracy A. Covington, do certify that I am a Registered Professional Reporter and Official Court Reporter in and for the State of Utah; that I reported the proceedings of the above-entitled matter at the aforesaid time and place. That the foregoing proceedings were reported by me in stenotype using computer-aided transcription.

That the same constitutes a true and correct transcription of the said proceedings.

That I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

WITNESS my hand at Ogden City, Utah, this 19th day of April, 2006.


Tracy A. Covington, RPR